9th ASIAN OMBUDSMAN ASSOCIATION CONFERENCE
HONG KONG
28 NOVEMBER – 1 DECEMBER 2005

THE EVOLVING OMBUDSMAN OFFICE
FREEDOM OF INFORMATION AND PROTECTED DISCLOSURE LEGISLATION – THE NEW ZEALAND EXPERIENCE

John Belgrave
Chief Ombudsman
New Zealand

I am very grateful for the opportunity to be able to address this Conference of distinguished colleagues from Asia.

The theme of this conference is the evolving Ombudsman office. The establishment of Ombudsman offices continues to proliferate in numbers as well as in diversity of structure and jurisdiction. There are now Ombudsmen in well over 100 countries.

The focus of my presentation is on the evolution of the Ombudsmen's jurisdiction in New Zealand, particularly in the freedom of information and protected disclosure areas, and how the evolution of our jurisdiction in these areas fits with our more "classical Ombudsman model" jurisdiction of investigating complaints of maladministration against government agencies.

THE OFFICIAL INFORMATION ACT 1982

Historical Context

In the last half of the twentieth century, public expectations of the role of government in New Zealand underwent fundamental change. Citizens were increasingly no longer prepared to have decisions and policies of government forced upon them. Citizens wanted government institutions, whose decisions could affect their day-to-day lives, to be more accountable for those decisions. What's more, citizens wanted to have a say in those decisions for themselves.

Citizens' ability to participate and be informed about government decisions can be inhibited by an inability to question, or seek redress against, decisions which they think are against their best interests. If one couples this with a lack of information about the basis on which decisions are made, there is little citizens can do to redress the balance.

The classical Ombudsman concept provides an avenue through which citizens can advance their goals of participation in the process of government.

New Zealand adopted the classical Ombudsman model in 1962. New Zealand's basic purpose in doing so was to enhance the accountability of the Government for its administrative conduct, especially when New Zealand had neither a written constitution nor an Upper House. However, in reality, with a first-past-the-post electoral system, the Executive ruled supreme, supported by the Official Secrets Act (whereby all government information remained the property of the government and was only disclosed with special authorisation).

Acknowledging the need for government to be more accountable for its administrative conduct, inevitably increased the pressure to open the processes of government to greater public scrutiny. As the Committee on Official Information (*the Danks Committee*) said, in arguing the case for a freedom of information regime in New Zealand:

> *"The case for more openness in government is compelling. It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office, it also derives from concern for the interests of individuals."*

New Zealand's Parliament set out on a course to fundamentally change the manner in which future governments were to operate. With the passing of the OIA in 1982, the New Zealand Government left behind an environment of secrecy to support its operations and moved to an environment of openness in which citizens were given the right to request access to official information.

Principles and Purposes of the OIA

The underlying principle of the OIA is that official information shall be made available unless there is good reason to withhold it.

The OIA seeks to strike a balance between public interest considerations favouring the disclosure of information and public interest considerations favouring the withholding of information. This is reflected in section 4 of the OIA, which sets out the purposes of the Act. On one hand, a purpose of the Act is to increase progressively the availability of official information to enable more effective participation in the making and administration of laws and policies and to promote the accountability of Ministers of the Crown and officials and thereby enhance respect for the law and promote the good government of New Zealand. On the other hand, another purpose of the Act is to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

The OIA therefore recognises that, even in an open and transparent system of government, it may be necessary, in the public interest, to withhold information in order to allow that system of government to function in an effective and orderly fashion or to protect the privacy of individual citizens.

What is Official Information?

What constitutes official information is comprehensively defined in section 2 of the OIA. Official information means any information held by Ministers in their official capacity, Departments and organisations. Significantly, New Zealand's definition of 'official information' does not refer to documents nor does it provide class exemptions for particular categories of information. For example, as information held by Ministers in their official capacity is official information, this brings Cabinet papers within the provisions of the OIA.

Any 'official information' held by those subject to the OIA is therefore open to request. The wide definition of what constitutes 'official information' has ensured that the principle of open government has become a central feature of New Zealand's public administration and has had a profound effect upon the quality of the information and documents generated by public officials.

Reasons for Withholding Information

Instead of providing exemptions for particular classes or categories of information, the OIA identifies a series of values or interests that may require protection. For example, section 6 of the Act identifies a series of 'national interest' considerations, such as the security, defence or international relations of New Zealand, the maintenance of the law and the safety of any person, which provide conclusive reasons for withholding information. Because the reasons for withholding information in section 6 are conclusive, the OIA effectively deems it to be in the wider public interest for information to be withheld if the requirements of section 6 are met.

By contrast, section 9 sets out a series of other potential reasons for withholding information, such as the protection of personal privacy, the commercial position of third parties or the ability of the government of the day to receive and deliberate upon advice in confidence. However, good reason for withholding information under these grounds will only exist if, in the circumstances of the particular case, the withholding of the information is not outweighed by other considerations which render it desirable, in the public interest, to make that information available.

In short, the OIA requires an outcome-based rather than a class-based approach to determining whether there is good reason to withhold information. The essential focus is on the predicted prejudicial effect of release rather than the nature of the information on its own. In short, the key question for holders of information is: "what is the harm if we make this information available?" This requires an intelligent value judgment in each case with the bias in favour of release if there is doubt about whether the "harm" will actually occur.

The Ombudsmen as the Review Body

The role of the New Zealand Ombudsmen under the OIA is to investigate and review decisions which have been made in response to requests for official information. The types of decisions which the Ombudsmen investigate include refusals of requests, delays in notifying requesters of the decision on their requests (such delays are deemed to be refusals), decisions to charge requesters for the supply of information they have requested and decisions to impose conditions on the use, communication or publication of information.

In my view, the system in New Zealand for the Ombudsmen to carry out the functions of the classical Ombudsman, namely the independent review of the administrative conduct of government agencies, fits comfortably and sensibly with the Ombudsmen also being the review body for complaints arising from the operation of the OIA. Many administrative wrongs arise from the incorrect use of information or the lack of access to information or an explanation. More citizens are using the OIA not only to obtain information about specific issues of concern to them but also as a method of determining the reasons for the decisions of government agencies that affect them personally. The outcome of such requests under the OIA can form the basis of complaints to this office under the Ombudsmen Act (*OA*) either because the information disclosed provides a basis for complaint about the decision or omission or, on occasion, the absence of information raises doubts about whether the decision was justified in the first place.

The OIA therefore provides direct support for one of the prime objectives of the OA which is to give the widest possible range of citizens the opportunity for redress against decision of government agencies.

In addition, issues which come to light during an OIA investigation may later become subject to an Ombudsman's investigation under the OA. In this regard, an Ombudsman can commence an OA investigation on their own-motion and does not have to wait for a specific complaint from an aggrieved citizen.

For example, following a recent OIA investigation conducted by one of my colleagues, it became apparent that certain information held by the agency concerned, which was relevant to the OIA investigation, was not provided for the purposes of his investigation. My colleague therefore decided to undertake an own-motion investigation, under the OA, into this omission. As a result of his investigation, he formed the view that the agency and the officials involved had failed to produce a document which he had required and he recommended that the agency take certain steps to improve its processes for handling official information requests and staff training. The agency has since substantially revised its official information procedures and has allocated a greater share of its resources to processing requests.

For the most part, we rely on our powers of persuasion to obtain acceptance of, and agreement with, the views that we form. The Ombudsmen institution has been in existence in New Zealand for over 40 years and we work hard to ensure the quality and transparency of our

processes and the fairness of our decisions. In large part, the majority of OIA complaints are resolved during the course of the investigation and review.

However, at the end of the day, the OIA does provide us with the power to make any recommendation on a complaint that we may see fit. Where an Ombudsman makes a recommendation, a public duty to observe that recommendation is imposed on the agency involved from the 21st working day after the date of the recommendation, unless the Governor-General, by Order in Council, otherwise directs.

The existence of the Cabinet veto provisions creates a dual tension: on one hand, it places a premium on the quality, transparency and fairness of our recommendations and, on the other hand, it also ensures that the government must carefully consider any decision not to observe a recommendation made by an Ombudsman. In my view, the effectiveness of our investigation methodology is demonstrated by the fact that, since 1987, the Ombudsmen have made over 100 formal OIA recommendations but the Cabinet veto has never been used.

The Situation Today

In my view, the framework which the OIA establishes for determining access to information continues to work well in most circumstances. Certainly the OIA has provided a strong impetus for government agencies to release more official information as a matter of course. Much information, which would have been withheld at the time the Act was enacted, is now routinely and pro-actively made publicly available by government agencies.

The requests that give rise to complaints about delay, cost or the withholding of information (in part or in whole) comprise, to the best of our knowledge, only a relatively small part of the total number of OIA requests received and processed by government agencies. It would appear that most requests are processed without difficulty within the time frames envisaged by the Act. Because of this, and the fact that more information is now made routinely available, the complaints that we do receive tend to be the more difficult cases where the volume, perceived sensitivity of the information at issue or the complexity of issues raised cause concern. Forming a view as to whether there is a justifiable basis, under the OIA, for the decision which is the subject matter of the complaint in such cases is becoming increasingly complex.

An example of the increasing complexity of our decision making concerns the application of the withholding grounds in the OIA which protect the process of developing and tendering of advice by Ministers and officials (section 9(2)(f)(iv)) and the free and frank expression of opinions necessary for the effective conduct of public affairs (section 9(2)(g)(i)).

The introduction of the Mixed Member Proportion electoral system and the advent of minority coalition governments in New Zealand have created a new context in which these withholding provisions have to operate. The constitutional conventions which determine the way in which government conducts its business have changed and the way in which the OIA is applied in such circumstances must reflect these changes. For example, discussions between political parties prior to the formation of a Government on coalition agreements or future policy options would not seem to be covered by the OIA. However, information relating to ongoing negotiations between a minority government and other parties on specific policy initiatives would likely be covered by the OIA. Premature release of such information before full consultation has occurred could prejudice the negotiation process and have implications for the overall stability of the Government.

In this context, the wording of section 9(2)(f)(iv) of the OIA becomes particularly relevant. Section 9(2)(f)(iv) will apply if the withholding of information is necessary to *"maintain the constitutional conventions* ***for the time being*** *which protect … the confidentiality of advice tendered…."* Section 9(2)(f)(iv) of the Act envisages changes in *"constitutional conventions"* over time and, in my view, is flexible enough to address any new issues that may arise in an MMP environment. However, in many cases, it will require fine, and often difficult, judgments to be made regarding the weight to be assigned to the various public interest considerations favouring both withholding and disclosure of the information at issue.

In recent years, we have also seen a greater use of the OIA by a much wider group of individuals. In particular, the OIA is increasingly used by members of the media, MP's, political party research units and the legal profession often acting for private sector companies. The degree to which the purposes of the OIA are met satisfactorily in difficult as well as straightforward cases, requires a positive attitude and intelligent application of the principles of the Act by holders and requesters of information alike.

Although I believe that the OIA provides a framework which has worked well in New Zealand for the last 20 years, it is essential that we constantly strive to avoid complacency in the way that the Act is applied. For example, my colleagues and I still experience difficulties with regard to the timeliness of some agencies' responses to Official Information Act requests and enquiries from our Office. Criticism is still being levelled at some agencies that are seen to be delaying unnecessarily the processing of official information requests. An unwillingness or inability on the part of some agencies to respond to official information requests within the statutory time frames specified in the Act diminishes the good progress that is being made, generally, through the dissemination of a great amount of official information into the public domain, both voluntarily and in response to official information requests.

In addition, occasionally the reasons for withholding information which are advanced by some agencies would seem to relate more to political or

administrative convenience than to legitimate withholding grounds under the Act. Political inconvenience or the potential for political embarrassment do not provide a justifiable basis for withholding information under the Official Information Act. As the Danks Committee said:

> *"The fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding information from the public."*

As the review body, we appreciate that we have an important educative role to play. During the course of our investigations, we aim to make our processes as transparent as possible and clearly explain the principles we are applying and the reasons for the views we have formed. We publish material, such as Practice Guidelines and Compendia of Casenotes, which explain the approach that we adopt to the various provisions of the OIA. We also respond to OIA education requests by providing training sessions for agencies on the operation of the Act.

In short, our aim is to encourage more than an attitude of simple *"compliance"* with the OIA. We have found that a *"compliance culture"* within agencies tends to encourage delayed responses to requests, a mechanical rather than an intelligent application of the Act and the release of the minimum amount of information covered by a request. Such outcomes increase the likelihood of misunderstanding and mistrust which inevitably erode public confidence in government processes. This is the very antithesis of the purposes of the OIA.

The Protected Disclosures Act 2000

The PDA came into force in New Zealand in 2001. The purpose of the Act "is to promote the public interest –

(a) *by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation; and*

(b) *by protecting employees who, in accordance with this Act, make disclosures of information about serious wrongdoing in or by an organisation."*

In broad terms, the PDA protects an employee of an organisation who discloses, in accordance with the Act, *"serious wrongdoing"* in that organisation from retaliatory action by the employer and from civil or criminal action in respect of the disclosure. *"Serious wrongdoing"* is defined in the Act and is limited to matters such as criminal acts; corrupt or irregular use of funds or resources of a public sector organisation; acts which pose a serious risk to public health or safety, to the environment, or to the maintenance of law; and acts by public officials that are oppressive, improperly discriminatory, grossly negligent or constitute gross mismanagement.

The PDA applies to employees in both public and private sector organisations and the definition of employee is wide, including former employees, a person seconded to an organisation and contractors.

The general approach of the PDA is to require disclosures to be made first within the organisation concerned so that the organisation has an opportunity to address the serious wrongdoing itself. If the organisation fails to deal with the matter, or the employee is not satisfied with the way it has been dealt with, the employee can report the matter to one of the *"appropriate authorities"* listed in the Act, such as the Ombudsmen, the Police or the Serious Fraud Office.

The PDA does not establish a specific agency to deal with disclosures – it relies on the agencies already existing in New Zealand. Nor does it confer any special powers on existing agencies to deal with disclosures – again it relies on the existing powers and functions of those agencies.

However, the Ombudsmen are given a specific role under the PDA, namely to provide information and guidance to employees who are considering making, or making, a protected disclosure (section 15 PDA).

The jurisdiction of the Ombudsmen to investigate a protected disclosure is limited to the jurisdiction vested in the Ombudsmen by the OA, namely to matters of administration affecting persons in their personal capacity and relating to one of the organisations subject to the OA. Although private sector organisations are subject to the PDA, private organisations are not within the Ombudsmen's jurisdiction. In such cases, an Ombudsman would seek to refer those matters to one of the appropriate authorities that had the jurisdiction to deal with the disclosure.

At the present time, the PDA contains no mechanism for the gathering of data regarding its use and there is no specific organisation having central oversight or control over the Act. It is therefore not possible to obtain a clear picture of the extent that the PDA is being used. Disclosures can be made to a variety of agencies, ranging from public sector organisations required to establish internal disclosure procedures, to the “appropriate authorities” listed in the Act.

In my experience, the PDA has not been used often. In practice, the actual numbers of potential disclosures which have come to our attention have not been great and most have been dealt with by the provision of information and guidance in accordance with section 15 of the PDA. For example, in the year ended June 2003, we received a total of 15 requests for further information about the PDA. Three of the requests required further inquiry. For the year ended June 2004, we received a total of 19 requests for further information. For the year ended June 2005, we received 7 requests for further information.

In 2003, a review of the operation of the PDA was conducted and the results presented to the Minister of State Services. In summary, the review considered the operation of the Act since it came into force, in light of submissions received from a range of interested individuals and noted:

> *“There is limited information available. It appears that the Act has had only limited use and some of that has been inappropriate….*
>
> *However, there were a number of important themes which emerged from the submissions. There was evidence of an inconsistent application of the Act, a number of issues arising out of the range of ‘appropriate authorities’ provided for under the Act, and a strong perception, possibly a reality, that it was unlikely that the identity of a person making a protected disclosure would remain confidential. This appeared to have implications for employee confidence in the process and consequently the effectiveness of the Act in achieving its purpose….*
>
> *I conclude that, while it is early days, there are some signs that the Act would benefit in particular from a greater involvement by a body such as the Office of the Ombudsmen, if that is appropriate, to assist and support those wishing to make protected disclosures, to co-ordinate the referral of matters to appropriate agencies and to monitor the operation of the Act. While a number of amendments are proposed, this in my view would provide the most value in resolving the issues which were raised and in promoting the purposes of this legislation.”*

(“*Review of the Operation of the Protected Disclosures Act 2000 Report to the Minister of State Services”*, Mary T Scholtens QC, December 2003).

The review recommended a number of amendments to the PDA which I won’t discuss, in further detail, here because the review itself is publicly available. However, as yet, little progress has been made to adopt these amendments. In my view, if the PDA is to function successfully in New Zealand it is important that the amendments foreshadowed by the review are made.

Conclusion

The framework which the OIA establishes for determining access to information has worked well in the New Zealand context and has stood the test of over 20 years. Much information which would have been withheld at the time the OIA was enacted is now routinely made available without difficulty. There is debate around the operation of the OIA, particularly focused on issues such as the need for decision-makers to have free and frank advice available to them. However, it seems to me that the OIA is well able to accommodate such situations. For example, there is no evidence that the essential business of government nor New Zealand's security or economic interests have been adversely affected by the Act. On the contrary, in my view, the operation of the Act has improved decision-making in New Zealand. It has encouraged better record-keeping and explanation of the reasons for government decisions which, in turn, helps promote better understanding and acceptance, on the part of citizens, of those decisions.

In my view, the powers of the Ombudsmen in New Zealand to investigate maladministration on the part of government agencies and to review the withholding of official information on the part of those agencies, work very much in tandem. Where freedom of information statutes are successful in widening the availability of information, then citizens are better able to participate in and question government decision-making. This, in turn, serves to promote accountability and good government overall.

The PDA has not been in existence in New Zealand long and, during that time, it has not been used often. In terms of the public sector, one reason for this may be the long history of the Ombudsmen model in New Zealand and the operation of our OIA over the last 20 years. Because of the more robust attitude to disclosure of official information in New Zealand, the level of instances in which it is necessary for an employee to use the PDA may be somewhat reduced.

Thank you for the opportunity to speak to you today.